Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-788

ARMOUR AND COMPANY,
Petitioner,

vs.

LOCAL UNION NO. 186, UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO, an Unincorporated Labor Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

Respondent, Local Union No. 186, United Packinghouse, Food and Allied Workers, AFL-CIO, an unincorporated labor association[1] opposes the Petition for Writ of Certiorari.

[1] The style of this case states Respondent is "an unincorporated Labor Corporation". This was obviously a typographical error in the lower Court caption which was overlooked.

Respondent respectfully prays not to review this cause but to deny the Petition for Writ of Certiorari because of the following:

1. The questions presented are foreign to the decision of the Sixth Circuit.

2. The decision of the Sixth Circuit is not in conflict with the decision of another Court of Appeals or of The Supreme Court.

3. The decision of the Sixth Circuit does not involve an important question of federal law which has not been, but should be, settled by the Supreme Court.

4. The decision below turns on its own particular facts and will not affect anyone except the litigants.

5. The decision of the Sixth Circuit in this cause is correct.

The Opinions below and Jurisdiction of this Court are correctly stated by Petitioner.

REPLY TO QUESTIONS PRESENTED BY PETITIONER

In response to the four questions submitted by Petitioner, Respondent would show as follows:

I

The question whether or not the employer closed its plant in good faith and for bona fide business reasons was never raised in this cause or any other legal proceedings.

The question before the District Court and the Sixth Circuit involved facts wherein employees were terminated before the beginning of the year in which vacations were to have been taken. The question under the Collective

Bargaining Agreement was whether or not the employees were entitled to vacation pay for work performed in 1966. The employer contended the employees must be actively employed on the first day of the vacation year.

The employees contended that all the conditions for vacation pay had been fully met, the vacation had been fully earned and only the time of receiving same had been delayed.

II

Question Two should be paraphrased as follows: Was it proper for the Courts below to consider among other factors (A) to apply "general rules of contract law as used by Labor Arbitrators" (B) to look to the specific language of the contract, and (C) to consider relevant industrial practice usage and custom?

III

A counter statement of Question Three is as follows: Should this Court consider the construction of typical vacation eligibility provisions in a collective bargaining agreement when the lower Federal Courts and an overwhelming majority of labor arbitrators are in agreement as to law?

IV

Question Four proposed by Petitioner was never raised prior to this Petition for Certiorari.

Based upon the record, the Sixth Circuit did not make a different "finding" as to facts, but, based upon competent facts, came to a different legal conclusion than the District Court.

REPLY TO STATEMENT OF CASE

As previously stated, the issue of the right of the employer to close its Chattanooga plant was never questioned in the proceedings below.

The Sixth Circuit considered applicable Federal law. There is no conflict between its decision and the decision of another Court of Appeals. The Sixth Circuit followed the guidelines adopted by this Court. The rule followed by the Sixth Circuit is the same as used by labor arbitrators.

Petitioner had its day in Court, and prior to this Petition for Certiorari, never raised the question of Due Process of Law.

PROCEEDINGS BEFORE THE DISTRICT COURT

A

Basic Facts

On September 18, 1966, Petitioner sold its Chattanooga Lookout plant facilities, rather than the plant facilities and collective bargaining agreement, to Swift & Company. Most or all of the employees had received their vacation in the summer of 1966 which had been earned in 1965. When the plant closed, any employee who had not already received this vacation pay for 1965 was then paid. The employees contended they had earned vacation pay in 1966 which normally would have been paid in 1967. When the Petitioner refused payment, Respondent invoked the limited arbitration procedure. When Petitioner refused to permit the case to go to final arbitration as the contract did not provide for compulsory arbitration, this suit was precipitated.

B

Vacation Provisions in Lookout Agreement

It is agreed that Petitioner and the International negotiated master agreements covering large meat-processing plants in the Chicago area. These master agreements were always negotiated in advance of the Lookout Contract.

Respondent is a completely autonomous, self-governing union that negotiated its own contracts. The masters' agreement was used solely as a guide but through the years, the Lookout agreement was altered by wording of various provisions and providing for many additional or different benefits (App., p. 95a). The applicable provisions of the Lookout agreement are as follows:

Paragraph 92 (App., p. 110a) provided that if the employees were separated, they should be paid for any vacation for which the employees had qualified but not taken. Paragraph 54 (App., p. 107a) provided employees who had earned vacations but were laid off by management prior to the date selected for their vacation pay would receive such pay. The contract did not define what was meant by "earned vacations". Other pertinent sections in the Lookout Agreement are as follows:

> "48. Continuous Service. An employe's continuous service for vacation purposes shall be deemed to begin with his Continuous Service Date (as defined in Paragraph 49) and shall be broken when an employe has quit, or has been discharged, or has remained in a status of layoff for a continuous period of two (2) years, or has otherwise separated from Company's employment."[2]

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[2] The other portion of this paragraph is not relevant herein.

"49. Continuous Service and Anniversary Date. The Continuous Service Date of an employe shall be:

(a) In the case of employes hired hereafter, the employes presently on the payroll who have not as yet established seniority, the date on which the employe first establishes departmental seniority on the plant payroll.

(b) In the case of employes presently on the payroll who have established seniority, the plant service date heretofore in effect and use for determining vacation eligibility for each such employe.

The Anniversary Date of an employe shall mean each anniversary of the employe's last established Continuous Service Date."

"50. Qualification for Vacation:

(a) Vacations for all employes will be granted on a calendar year basis in accordance with the following eligibility requirements.

(1) Employes who have one (1) or more years of continuous service as of January 1 (except for new employes provided for below) will be granted vacations during the calendar year January 1 to December 31, provided they have worked a minimum of one hundred fifty (150) days during the preceding year."[3]

"51. Length of Vacation. Subject to qualifying in accordance with Paragraph 50:

(a) and (b)[4]

(c) An employe will be entitled to two (2) weeks' vacation with pay in the calendar year in which he will complete three (3) years of continuous service and in each calendar year thereafter to and including

[3] The other portion of this paragraph is not relevant herein.

[4] The other portion of this paragraph is not relevant herein.

the calendar year in which he will complete nine (9) years of continuous service.

(d) An employe will be entitled to three weeks' vacation with pay in the calendar year in which he will complete ten (10) years of continuous service and in each calendar year thereafter to and including the calendar year in which he will complete nineteen (19) years of continuous service.

(e) An employee will be entitled to four (4) weeks' vacation with pay in the calendar year in which he will complete twenty (20) years of continuous service and in each calendar year thereafter."

The District Court did not consider, or at least did not comment, on Paragraphs 49 and 51. The Sixth Circuit cited in its opinion verbatim Paragraph 49 and considered all the paragraphs.

C

Continuous Service Dates of Employees

Exhibit I to the Complaint lists the names of 125 employees making claims. This exhibit lists the continuous service date of each employee and his number of continuous service years as determined by Paragraph 49 of the Contract. The information on this exhibit was posted by the Company, and there was no objection as to its accuracy. The continuous service years of the employees range from four years for the most junior employee to forty years for the most senior employee.

D

Errors of District Court in Applying Contract Language

Petitioner cites at length from the three-page affidavit of Fred A. Peterson, a Company affiant (App., pp. 13a, 14a, 15a). In fact, this is the only evidence other than contracts referred to by Petitioner.

This affidavit, with one exception,[5] was charged by Respondent to be false or at least containing erroneous conclusions. On a Motion for Summary Judgment, conclusions are not to be accepted.[6] For example, Mr. Peterson makes oath that when January 1 was inserted into the contract in 1960, "the 'anniversary date' has thus become January 1". (App., p. 15a.) A mere reading of Paragraph 49 shows this statement is erroneous.

In a further effort to have the Court to focus its attention to January 1, Mr. Peterson states he was personally present in the Lookout negotiations in 1959 and the Union requested the same vacation pay provisions as in the just negotiated Master Agreement and the Company acceded to the Union request. The District Court could have been misled for the inference is that the contract language of the Lookout contract is the same as the master contract. Master contracts were made exhibits to Peterson's deposition and show that much of the contract language of the Master contract as compared to the Lookout contract is entirely different. For example, the master contract negotiated just before the Lookout contract has specific language to govern employees in a situation similar to the employees herein involved. If working under a master contract these employees would be specifically covered, or not covered, under either 14.8 (App., p. 20a) or 14.10 (App., p. 22a). These provisions relating to layoffs, disability, quit, discharge or death were also geared to January 1. The Lookout contract does not contain such clauses.

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[5] The exception was affiant stated the purpose of the change in adding January 1 to the collective bargaining agreement was for Company administrative purposes to which the Respondent agreed. This evidence is discussed more fully hereinafter in this brief.

[6] **Union Insurance Society of Canton, Ltd. v. William Gluckin & Co.**, 353 F. 2d 946 (2nd Cir. 1965). This case was cited by Petitioner for other reasons.

The District Court in its Memorandum Opinion quoted at length from Mr. Peterson's affidavit and from another affiant of the Company, William C. Campbell (App., pp. 80a, 82a). On the Petition to Reconsider, the District Court, without changing its decision, appears to back away from these affidavits and stated "the ultimate conclusion reached by the Court was based primarily upon the contract language as agreed to by the parties" (App., p. 102a).

Once the false premise January 1 was the anniversary date of each employee, the District Court's attention was focused to January 1 by Petitioner's briefs.[7] The Petitioner emphasized "continuous service" as defined in Paragraph 48. Instead of considering "one or more years of continuous service" which the employee would complete in the calendar year prior to January 1, the Petitioner insisted the language be read by omitting "one or more years" as if all the words were "continuous service as of January 1". The Petitioner then argued this continuous service was broken on September 18 when the employees were separated from the Company.

The District Court apparently accepted this argument as in its Memorandum the Court emphasizes "continuous service as of January 1" (App., p. 87a). As previously contended, the District Court seems to have overlooked Paragraphs 49 and 51 of the Lookout contract. At least there was no comment on these paragraphs. Paragraphs 48, 49, 50 and 51 when read together are clear and free from ambiguity. All of the employees herein had the amount of vacation due fixed by Paragraphs 51 (c), (d) and (e) of the Lookout agreement. By September 18, 1966, 87 employees had gained one more year of "continuous

[7] At the request of the Petitioner all briefs in the District Court were made part of the record. All briefs in the Court of Appeals were requested to be filed in this Court by Petitioner.

service''; as their anniversary dates fell between January 1, 1966, and September 18, 1966; 38 employees still had the same number of continuous service years as in the previous year as their ''Anniversary Dates'' fell after September 18, 1967. Paragraph 51 (c), (d) and (e) specifically provide for such continuous service in the calendar year which the employee completes such service and ''in each calendar year thereafter''. Thus all the employees had fully qualified or earned their 1966 vacation by having one or more years of continuous service and working for 150 days.

It was, and is, the position of the employees they had fully earned their vacation pay and only the time of receiving same, January 1, 1967, was deferred. To illustrate, we turn to the actual case of the junior employee, Forest Kelley (Exhibit 1 of Complaint; Transcript). Mr. Kelley obviously went to work late in 1961 or early in 1962. After he completed his training or probationary period, he gained departmental seniority on March 12, 1962. March 12, 1962 is his ''continuous service date'' and this date is posted. After working one year thereafter, March 12, 1963 would be his ''anniversary date''. When Mr. Kelley was permanently laid off or terminated on September 18, 1966, his last anniversary date was March 12, 1966. Paragraph 51 (c) provides an employee will be entitled to two weeks' vacation pay in the calendar year in which he will complete three years of continuous service and in each calendar year thereafter until he completes nine years of such service.

Mr. Kelley, on March 12, 1966, completed four years of continuous service and in that year, 1966, he worked the required 150 days. As previously stated, Paragraph 51 also was perhaps overlooked by the District Court. However, as that may have been, is not Mr. Kelley entitled to two weeks' vacation within the plain meaning of the con-

tract since he completed the required years and worked the required number of days in 1966?

It is respectfully submitted the claims of the employees are a perfect example of the rationale of the decision in **Re Wil-low Cafeteria,** 111 F. 2d 429 (2nd Cir. 1940), wherein that Court said:

> "The consideration for the contract to pay for a weeks vacation had been furnished, that is to say, one year's service had been rendered prior to June I, so that the week's vacation with pay was completely earned and only the time of receiving it was postponed."

E

History of Lookout Pay Provisions

Prior to 1960, vacations were granted on a continuous service year rather than a calendar year. Any employee with one or more years of continuous service could take their vacation after working the required number of days (then 185 days) by their anniversary date. Most employees could take their vacation from three to five months in advance of their anniversary date depending on the number of years of continuous service. It was perfectly clear that had the wording of contracts prior to 1960 had not been changed all the employees involved herein would have been entitled to the vacation pay sought herein under a provision such as 14.11 (d)[8] (App., p. 97a).

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[8] 14.11 Vacation Period—(d) Employees who may be entitled under paragraph (b) or (c) above to take their vacation in advance of their Anniversary Date shall, if they become disabled or laid off during the three or five month period, whichever is applicable, be entitled upon request to receive their vacation pay at the time of such disability or layoff.

Why was January 1 inserted into the contract? The only evidence of Petitioner before the District Court was the affidavit of Peterson that the Company was having difficulty in administering vacations because the anniversary dates, especially the pre-anniversary dates, of the employees were different. It can be reasonably argued that the Company desired to place all the vacations in the following year, and they were merely postponed for administrative purposes. The Respondent's affiant, F. L. Tate, replied:

> "The purpose of eliminating this Clause was, as Mr. Peterson states, merely to have an uniform time in taking vacations and all vacation periods were merely postponed until after January 1."

The employees have never had more than one vacation in a calendar year, and when the change was made for 1960 and thereafter, it was expressly provided there could only be one vacation in a calendar year. There is not a scintilla of evidence the employees were changing the anniversary date to January 1 as the Company's affiant, Peterson, contended and Petitioner now contends.

By consenting to change the date when vacations could be taken, there is no evidence the employees were giving up the rights they had earned at the bargaining table. This history clearly shows that only the time for taking the vacation was postponed.

The District Court did not consider or at least there was no comment on this relevant past history of the Contract and Negotiations. The Sixth Circuit considered this history along with the language of the contract in question and other factors. The Sixth Circuit found that January 1 was not the "anniversary date" of the employees and the insertion of said date was not a material nature, but one of administrative convenience to Petitioner.

F

Industrial Practice

The Petitioner contends the Sixth Circuit ignored relevant industry's practices and experiences. Petitioner states it closed a number of plants after September, 1959, all of which were subject to the vacation pay provisions contained in the master agreement which in turn were identical to those contained in the Lookout agreement. It states that at each instance, the International did not object.

In one of Respondent's affidavits it was stated Respondent was a completely autonomous self-governing union. That it negotiated its own contracts with the Lookout Company. Respondent had absolutely no knowledge of the contracts in Texas, Massachusetts, New Jersey or any other state. Respondent denied these contracts had identical vacation provisions. Further, Respondent stated it had no knowledge as to how the Company unilaterally administered these contracts as the same was never communicated until after the lawsuit was filed herein (App., pp. 95a, 100a, 101a). The Petitioner did not deny any of these statements. Of course, Respondent could not be bound by contracts in which it did not participate or have any knowledge thereof.

One of the Petitioner's affiants, William C. Campbell, swore the language in the Master's contract, the Texas contract, Iowa contract and Kansas contract were identical (App., pp. 40a, 41a and 42a). The District Court observed in its Memorandum Opinion that "Mr. Campbell avers that the vacation pay clauses being identical to those contained in the Lookout contract were administered exactly the same as in the instant case" (App., p. 81a). Again, the District Court was mislead, or could have

been mislead, as much of the language in those contracts is not identical or reasonably similar.[9]

Respondent in reply in its Petition to Reconsider submitted the arbitrator's decision of Professor Archibald Cox in the case of **Telescope Folding Furniture Co.**, 49 LA 837 (1967), as well as **Statistics on Industrial Practice** as gathered by the Bureau of National Affairs, Inc. Professor Cox emphasized that industrial practice was contrary to that which Petitioner contends.[10] It was specifically pointed out in **Telescope Folding Furniture** for a union to be bound by the practice of its employer, it must participate in such practice.

The District Court did not consider at least there was no comment by the Court on settled industrial practice.

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[9] Paragraph 14.8 (App., p. 47a) of the Master Contract governs vacations during layoffs and disability which is geared to January 1. Paragraph 14.10 (App., p. 49a) covers the situation when an employee quits, is discharged or in the event of death which is also geared to January 1. The Texas contract contains Paragraph 50 (App., p. 48a) similar to 14.10 of the Masters' Contract and Paragraph 52 (58a) similar to 14.10 of the Masters' contract.

* * * * * * *

The other contracts introduced by Petitioner contained the following clauses. The Massachusetts contract has Paragraph 49 (App. p. 63a) similar to 14.8 of the Masters' contract, and Paragraph 52 (App., p. 65a) similar to 14.10 of the Masters' contract. The New Jersey Contract has Paragraph 7 (App., p. 71a) similar to 14.8 of the Masters' contract, and Paragraph 9 (App., p. 73a) similar to 14.10 of the Masters' contract.

The Lookout Agreement does not have such clauses.

[10] In **Telescope Folding Furniture Co.** at pages 838 and 839, Professor Cox stated:

> "Nevertheless, I must conclude that the particular contract before me was intended to have the meaning given to similar vacation clauses by settled industrial practice, unless there is some evidence of a contrary intention. * * * Here, however the question is governed by the words of the contract and, read in the light of industrial practice, they are unambiguous. * * * In any event, the inferences to be drawn from these clauses are not strong enough to overturn the well-settled principles that prevail in industry generally under this form of vacation agreement."

G

Pro Rata Vacation Not Involved

The District Court was of the opinion Respondent was seeking a pro rata share of the vacation pay (App., pp. 83a, 88a). The Respondent in its pleadings or briefs never made such contention. Respondent took the position at all times the vacation pay was fully earned at the time of the layoff.

The District Court using the common law approach compares the express pro rata provisions for retiring employees and concluded since there was an express provision for retiring employees, the parties did not intend to have pro rata benefits for vacation pay for other employees (App., pp. 88a-90a).

In all due respect to the learned District Court, it is respectfully submitted that it would be impossible to have a pro rata question. A study of the two requirements for vacation pay show one requirement was to work 150 days in a calendar year; the other requirement was to have "one or more continuous years". The latter requirement merely determines the number of weeks of vacation the employee is entitled after working the 150 days.

The only way possible to have had a pro rata question would be had the plant closed when the employees had worked less than 150 days. For example, if the employees had worked just 50 days and were claiming one-third vacation pay, the question would have been involved.

The Company had compulsory retirement at the age of 65 be it whatever quarter of the year when the employee became 65. This provision for retiring employees is based on a pro rata basis of 150 days. That is, 38 days a quarter or roughly one-fourth of the required 150 days. For all other employees, they had to work 150 days to fully earn their vacation pay.

Perhaps the District Court arrived at its conclusion for the reason that Court seemed to be of the opinion the "continuous service year" was the same as a "calendar year". Be that as it may, a pro rata vacation question is not involved and cases cited by Petitioner on the question of pro rata vacations are not in point.

H

Synopsis of District Court Decision

It is respectfully submitted the District Court was first mislead by the affidavits submitted by Petitioner. The District Court did not consider the following relevant factors: 1. The previous negotiations and history of the contract at the Lookout plant, 2. Relevant industrial practice.

On the Petition to Reconsider, the District Court stated it decided the case primarily on the contract language (App., p. 102a). Yet, the District Court did not consider two of the most important defining sections, Paragraphs 49 and 51, to interpret Paragraph 50.

The District Court was of the opinion the Respondent was seeking a pro rata share of the vacation pay. The Respondent never made such contention. Respondent took the position at all times the vacation pay was fully earned at the time of the layoff.

The District Court mentioned several cases of this Court to be used as guidelines. These cases had been suggested to the District Court by Respondent in its original brief. The District Court, instead of following said cases and the governing body of Federal law, turned to State law especially the 1952 Michigan decision of **Treigar v. Steggeman**, 339 Mich. 166, 52 NW 2d 647, and the 1965 Missouri decision of **Brackett v. Easton Boot and Shoe Co.**, 388 SW 2d 842. The Brackett case involved a pro rata question.

THE SIXTH CIRCUIT'S OPINION

The Sixth Circuit immediately recognized governing Federal law which must be followed. The Sixth Circuit cited the decision of Professor Archibald Cox of **Telescope Folding Furniture Co.** (1967), 49 LA 837. This arbitration decision is a complete brief on the subject matter. Professor Cox states the leading case from which labor arbitrators developed their rule was the Second Circuit decision in **Re Willow Cafeteria**, 111 F. 2d 429 (C.A. 2, 1940). The rule followed by labor arbitrators is that vacation pay is deferred wages unless there is a specific contrary intent. Professor Cox at Page 838 emphasized: "The arbitrator cannot ignore the omission of such critical words". The Sixth Circuit observed it had followed **Re Willow Cafeteria** in the following cases: **Smith v. Kingsport Press, Inc.** (1966), 366 F. 2d 416, and in **Hue v. E. I. Dupont deNemours & Co.** (1963), 324 F. 2d 546.

The Sixth Circuit carefully considered the past history of the Lookout contract and commented in detail concerning the same. By citing **Telescope Folding Furniture Co.**, it recognized established industrial practice.

The Sixth Circuit considered and analyzed the various sections of the contract, quoting verbatim Paragraph 49. Based upon all factors, the Sixth Circuit came to a different legal conclusion than the District Court.

The Sixth Circuit after reaching its conclusion that all employees had earned vacation pay, then considered that under a strained interpretation, in view of past bargaining history, its conclusion might not benefit those workers who had not reached their individual anniversary dates. The Court obviously had in mind the 38 employees who had not reached their anniversary dates. Such an employee was Charles Strickland with 32 years of continuous

service whose anniversary date fell on September 20, two days after his termination.

The Sixth Circuit to remove any doubt about these employees relied in part on the general rules of contract law. Whereas, this Court has stated a collective bargaining agreement is not an ordinary contract nor is to be governed by old common law concepts, it is respectfully submitted this Court has never gone so far as to hold that in a novel situation one cannot consider such common law along with all other factors. The Petitioner cannot argue against the equity of the decision of the Sixth Circuit. In essence, the Petitioner seems to ask this Court to reverse because the Sixth Circuit considered ordinary contract law on this one issue. It is respectfully submitted that on occasions, while application of ordinary contract rules should be guarded, nevertheless, they may be useful. It would appear the only alternative on novel issues would be that the Court declare a new concept. In any event, the Sixth Circuit, in addition to general contract law on this issue, relied on decisions of labor arbitrators and in particular, the decision of the labor arbitrator in **Mays Landing Water Power Co.**, 12 LA 1261. The Petitioner cites no authorities to the contrary.

Respondent respectfully submits that even under a strained interpretation of past bargaining, the above issue is never reached. Prior to 1960, the contracts which Petitioner introduced show as in Paragraph 14.11 (supra), that in case of layoff, if the employee was within three to five months of his anniversary date (whichever was applicable), he received the vacation pay. The working days required were then 185 days or roughly 9 months of a working day year. Under any of the old contracts, it was not necessary for the employee to reach his anniversary date. As the Respondent's affiant, F. L. Tate stated:

"I agree with the affidavit of Fred A. Peterson that prior to 1959 an employee could take his vacation before the Anniversary Date" (App., p. 96a).

The employees claim the "continuous service year" is merely a provision fixing the number of weeks for various benefits to which an employee was entitled. The same formula was used to determine the number of weeks for disability and retirement benefits. The formula was used for the separation allowance as provided in Paragraph 90-92 (App., pp. 109a, 110a). The Company had no difficulty in determining these continuous service years for separation benefits. There is no difficulty for vacation pay.

Lastly, it should be pointed out the Sixth Circuit did not reject Respondent's further contention that Paragraph 54 (App., p. 107a) is also controlling. The Sixth Circuit did not reach this contention. Paragraph 54 provided the employee, in event of layoff, was entitled to "earned vacation." Paragraph 54 is a peculiar provision which is not contained in any contract submitted by Petitioner. Keeping in mind this paragraph had been in all previous Lookout contracts, wherein the employees could take their vacation within three to five months of their individual anniversary dates, that 185 working days were required; further considering there has always been a special provision for first year employees, one can only ask what was the purpose of Paragraph 54 for those employees with more than one year of continuous service except that a vacation was earned by working the required days?

REASONS FOR DENYING WRIT

The Decision of the Sixth Circuit is Correct

Federal Law

This Court has held one of the primary goals of Federal labor law is the promotion of industrial peace and this goal necessarily requires a uniform body of federal common law to insure certainty in the collective bargaining process. **Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Lucas Flour Co.** (1962), 369 US 95.

Even before the decision in **Lucas Flour Company**, labor arbitrators had turned to the second Court's decision of **Re Wil-low Cafeteria** (supra), to develop a uniform rule. That rule has been followed almost uniformly by labor arbitrators and the lower Federal courts. Typical of a District Court decision prior to the Sixth Circuit's decision in the instant case is that of Chief Judge Freeman of the Eastern District of Michigan in the case of **International Union, U.A.A. & A.I.W. v. Aluminum Alloys Corp.** (1970), 310 F. Supp. 213. In this case, Judge Freeman said:

> "The Court of Appeals for this circuit, considers vacation pay to be deferred wages unless a specific contrary intent is found within the terms of the contract."

The Sixth Circuit in approving the labor arbitration decision of **L. Hyman Co., Inc.**, 13 LA 803, and **Telescope Folding Furniture Co.** (supra), and other arbitration decisions recognized this general rule of labor arbitrators. The case of **L. Hyman Co., Inc.**, was decided by Mr. Robert P. Brecht who at the time held the chair as professor of industry, University of Pennsylvania, an author of well-known and generally accepted books on labor-management

relations. Professor Brecht used the same approach as Professor Cox.

The opposite rule as developed by some State courts in old cases was based on the common law rule, What is the intent of the parties as generally expressed in the language used? This was the approach of the District Court. The District Court did not hesitate to say its decision was based primarily on the language of the contract. The District Court, had it considered all the relevant contract provisions, could have reached the same result as labor arbitrators even under the common law rule. As previously stated, the District Court was of the opinion the Respondent was seeking pro rata vacation pay. Had the District Court applied the rule of labor arbitrators and the lower Federal courts, the District Court decision would necessarily have been just the opposite. In the Lookout contract, there are no critical words which specifically state the employees must be working on January 1.

The Lookout contract provided for voluntary arbitration rather than compulsory arbitration. In view of the decisions of the overwhelming majority of eminent arbitrators, one can only ask, is this not the reason the Petitioner refused to permit this case to go to final arbitration?

As Professor Cox observed in **Telescope Folding Furniture** at Page 840: "It is necessary, however, to have a rule one way or the other." It is respectfully submitted that in the event this Court were to reverse the Sixth Circuit, instead of having industrial peace, only chaos would result.

Tennessee Law

If any State law is to be considered, it is respectfully submitted that only the law of the State of Tennessee should be considered. All Lookout contracts were executed in the State of Tennessee. This Court has stated, State

courts have concurrent jurisdiction but must apply applicable Federal law. Tennessee law may have some significance in view of the fact this Court has stated the contract must be read as a whole and in the light of the law relating it to when made. **Mastro Plastics Corp. v. NLRB**, 350 US 270 (1956). Of course, the Lookout contract was made when Tennessee law had been superseded by Federal law but one might argue that the prior contracts had been made when Tennessee law was applicable.

The Tennessee Supreme Court in 1957 had the exact issue involved herein before it. In regard to contract interpretation, it is infrequent that you have a previous decision almost identical as to controlling facts and contract language. Such is the case of **Textile Workers Union of America v. Brookside Mills** (1957), 203 Tenn. 71, 309 SW 2d 371. In this case, the employees were terminated prior to June 1, 1956, and the Company argued "continuous service" meant the employees must be in the employ of the Company as of June 1, 1956. The pertinent provisions of that contract is perhaps more similar to the one involved in the Lookout contract than any other case cited to this Court by either party. The Brookside Mills contract provided in part as follows:

> "Section 1. All employees who on June 1, 1950, and June 1 of each succeeding contract year, have continuous service with the employer will be paid vacation pay according to the following schedule."

The Tennessee Supreme Court noted it had several authorities submitted to it but did not reveal the authorities. It is respectfully submitted they could have been only those of labor arbitrators. The Tennessee Supreme Court held the contract did not have specific language stating to the effect "all who are employees on June 1", but the contract stated, "all employees who on June 1"; "nor does the contract require that service be continuous up to June

1 or some similar expression." The Tennessee Supreme Court then stated:

> "If, therefore, in the face of this ambiguous language we should hold that an employee who has put in at least 6 months continuous time may be deprived of his vacation pay by being permanently terminated by the employer a few days short of the date of June 1 through no fault of the employee, then we would be reading into the contract a provision for a forfeiture which does not exist."

The Tennessee Supreme Court case is cited in most textbooks as the leading decision on the words, "continuous service." Thus, it is seen that under applicable Federal law, even considering the law of the State of Tennessee, the decision of the Sixth Circuit is correct.

REPLY TO FOUR REASONS ADVANCED BY PETITIONERS TO GRANT THE WRIT

I

Sixth Circuit Decision Is Not in Conflict With the Decision of Any Other Circuit.

Petitioner relies principally on the decision of the Seventh Circuit in the case of **Local Lodge 2040, International Association of Machinists, AFL-CIO v. Servel, Inc.**, 268 F. 2d 692 (7th Cir.), cert. den., 361 U.S. 884 (1959). If Petitioner felt this case was important or even in point, it seems likely it would have called this decision to the attention of the Courts below in its briefs.

In **Local Lodge 2040**, the principal questions before the Seventh Circuit are foreign to the instant case. The Seventh Circuit was not concerned with facts showing an earned or vested right. A vacation claim was briefly discussed toward the end of that decision. The Seventh Circuit merely approved the District Court's holding that no employee was entitled to payment in 1958 because no such person was an employee with seniority on January 1 as specifically required by Section 237 of the agreement. This holding is in accord with the Sixth Circuit decision and that of labor arbitrators.

The other Circuit Court decisions cited involve the right of an employer to terminate its business with the holding that rights not earned or vested do not survive. In the footnote at the bottom of Petitioner's brief, Page 17, in referring to this Court's decision in **Textile Workers Union of America v. Darlington Mfg. Co.**, 380 U.S. 263 (1965), it is stated "this right is, of course, subject to the employer satisfying all obligations which were vested at the time of termination". Respondent agrees with this statement. Petitioner then adds, "As noted, however, we

are not here dealing with vested rights, but, rather, rights which were concededly non-vested". No one has conceded the earned vacation pay involved herein is non-vested as Petitioner contends. It is just to the contrary.

It is quite obvious from reading the decision of the labor arbitrator in the case of **H. K. Porter Co.**, 49 Lab. Arb. 147 (1967), the Sixth Circuit gave great consideration to this decision although it is not specifically referred to in its opinion. This case was decided by Sidney L. Cahn, the former U. S. Commissioner of Labor, Panel Chairman of the War Labor Board and chairman of several presidential fact finding commissions. In **H. K. Porter Co.**, the arbitrator had before him facts very similar to the instant case. Using a typical arbitrator's approach, he held that deferred compensation for services rendered is a "vested right".

Petitioner discusses at length the Second Circuit decision of **Zdanok v. Glidden Co.**, 288 F. 2d 99 (2d Cir.), cert. den. on this issue, 368 U.S. 814 (1961). Petitioner states the decision was so unfavorable, the Second Circuit sitting **en banc** overruled Zdanok in **Local 1251 Int. U. of U.A., A. & A.I.W. v. Robertshaw Controls Co.**, 405 F. 2d 29 (2d Cir. 1968).

In reading the **Robertshaw Controls Co.** decision, the Second Circuit states its first ruling in Zdanok was so unpopular that labor arbitrators would not follow it. In reversing, the Second Circuit relied upon the Sixth Circuit's decision in the case of **Oddie v. Ross Gear and Tool Co.**, 305 F. 2d 143, cert. den. 371 U.S. 941 (1962). The Second Circuit then held in the last complete paragraph of its decision, "If rights are to persist beyond the term of the collective bargaining agreement, the agreement must so provide or be susceptible of such construction". This is exactly what the Sixth Circuit held in the instant case.

II

The Sixth Circuit Used as Guidelines the Decisions of This Court.

The discussion heretofore under the topic, "Sixth Circuit Decision", is a complete answer to Petitioner's argument. As pointed out, the Sixth Circuit considered (1) all the terms of the agreement; (2) the history of the Lookout agreement and past negotiations; (3) established industrial practice; (4) the law as developed by labor arbitrators and the lower Federal courts.

III

Interpretations by State Courts in Old Decisions Do Not Warrant a Review by This Court.

Respondent agrees with Petitioner that this Court has stated one of the primary goals of Federal labor law is the promotion of industrial peace and requires a uniform body of Federal common law. **Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Company,** 369 U.S. 95, 103-104 (1962). Petitioner again restates the Seventh Circuit case of **Local Lodge 2040** (supra). Actually, most of the cases cited by Petitioner are in accord with the law as found by the Sixth Circuit but involve different facts. The Wisconsin decision of **Briggs v. Electric Auto-Lite Company,** 37 Wis. 2d 275, 144 N.W. 2d 32 (1967) and the Missouri decision of **Brackett v. Easton Boot and Shoe Company,** 388 S.W. 2d 842 (1965), are concerned with the issue of "pro rata vacation" which has been previously shown is not herein involved.

In the **Briggs** case, the employees conceded they had not met the terms of the contract by working the required

twelve months but desired a pro rata vacation based upon the months they had worked. The agreement before the Wisconsin Court specifically granted the benefits only "provided employee was in active employ on Dec. 31". The decision is in accord with labor arbitrators and lower Federal courts. In **Brackett v. Easton Boot**, the employees also recognized they had not earned their vacation pay and sought a pro rata portion for the period they had worked. The same pro rata contention was also before the arbitrator in the case of **Hillman Transportation Co.**, 46 Lab. Arb. 509 (1966).

In the 1956 New Jersey case, **Botany Mills v. Textile Workers Union**, 42 N.J. Super. 327, 126 A. 2d 289 (1956), the result would be the same if the rule of labor arbitrators was applied. In the 1956 Ohio case, **International Union, United Automobile, Aircraft and Agricultural Implement Workers of America v. L. T. Patterson Co.**, 8 Ohio Op. 2d 334, 159 N.E. 2d 923, aff'd per curiam 159 N.E. 2d 917 (1956), appeal dism'd, 166 Ohio St. 148, 140 N.E. 2d 318 (1957), the same result would occur as the agreement provided no vacation benefits "unless he (the employee) was in the employ of the Company on April 15". A typical approach is used by the labor arbitrator in **Oldberg Manufacturing Co.**, 51 Lab. Arb. 509 (1968) by considering the history of the agreement and the negotiations.

In **Trelor v. Steggeman**, 333 Mich. 166, 52 N.W. 2d 647 (1952), the State court found there was a definite prescribed condition that the employees be working on a certain day. Arbitrators follow this rule under such facts. As Professor Cox stated in **Telescope Folding Furniture Co.**, supra, in regard to the rule followed by arbitrators "only a small minority of the cases are opposed to this conclusion and most of them rest upon peculiar facts". Such are the cases cited by Petitioner.

IV

Petitioner Not Deprived of Due Process of Law.

In Petitioner's footnote, Page 27, Petitioner concedes the issue of Due Process of Law was not raised in the lower courts. It is respectfully submitted for the Court to consider this issue for the first time would be contrary to Rule 23 (1) (f) of this Court.

Petitioner argues that when the case was initially decided, petitioner's affidavits as to the primary purpose of changing the language of the contract was not controverted. This alleged purpose in the affidavits was merely a conclusion of Petitioner, and conclusions are not to be considered on a Motion for Summary Judgment. In Respondent's reply brief in the District Court, the statements of Petitioner were merely inferred to as conclusions since Respondent was of the opinion these erroneous conclusions would be noticeably outstanding. In the Petition to Reconsider before the District Court, these conclusions were denied by Respondent's affidavit.

The only possible conclusion that would be permissible would be the one conclusion to which Respondent agreed, which was the Petitioner merely desired to postpone vacations for administrative purposes. Had the contract not been changed for the convenience of the Company, every employee involved hereto would clearly be entitled to vacation pay under the wording of the former agreements.

Petitioner has not cited any facts overlooked. The Sixth Circuit simply came to a different legal conclusion based upon the facts than the conclusion of the District Court. It is respectfully submitted that Petitioner had its day in Court.

CONCLUSION

It is evident from the foregoing reasons there is no merit in the Petition for a Writ of Certiorari in this cause. Therefore, it is respectfully prayed that the Writ of Certiorari be denied.

Respectfully submitted

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